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Supreme Court of the United States

October Term 1962

No. 989

STATE OF RHODE ISLAND,
Appellee,

against

ROBERT MILNE,
Appellant.

On Appeal from the Supreme Court of the State of Rhode Island

JURISDICTIONAL STATEMENT

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October Term 1962

No. .....

STATE OF RHODE ISLAND,
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On Appeal from the Supreme Court of the State of Rhode Island

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JURISDICTIONAL STATEMENT

(a) Reports of the Opinions in the Courts Below

The opinion of the Supreme Court of the State of Rhode Island has not yet been officially reported. However, it is reported in 187 A. 2d 136, and is set forth in full in the Appendix hereto at Pages 13 to 22.

(b) The Grounds on which Jurisdiction of the Supreme Court of the United States is Invoked

(i) On April 7, 1960, the Appellant was indicted for an alleged violation of Title 11, Chapter 34, Section 5 of the General Laws of the State of Rhode Island (1956), which statute is set forth in full in the Appendix hereto at Page 24. The specifications of said indictment are that Appellant did, on a day between June 1, 1959 and September 30, 1959, receive into his home at 96 High Street, Westerly, Rhode Island, one Louis M. Algieri, Jr., for the purpose of committing "an indecent act, to wit, for the pur-

pose of receiving into the mouth of said Robert Milne, alias Bob Milne alias John Doe, the penis of the said Louis M. Algieri, Jr. whereby there occurred carnal connection per os."

On May 26, 1960, Appellant filed a motion to quash the indictment on the grounds, among others, that the statute as written and applied, violated Section 1 of the Fourteenth Amendment to the Constitution of the United States, and to certify said constitutional questions to the Supreme Court of Rhode Island in accordance with Title 12, Chapter 22, Section 10 of the General Laws of Rhode Island (1956). Following the denial of the above motions, Appellant was tried and convicted in the Superior Court of Providence County, Rhode Island, of the crime alleged in the indictment. On January 4, 1961, he was sentenced to serve one year in the Adult Correctional Institutions of the State of Rhode Island, despite the fact that he had, on that date, filed a motion in arrest of judgment on the same constitutional grounds as had been previously asserted in the motions to quash and certify.

Appellant then appealed to the Supreme Court of Rhode Island, raising in said appeal the same constitutional objections as had been previously raised below. On December 28, 1962, Appellant's conviction was unanimously affirmed, and he is presently confined at the Adult Correctional Institutions of the State of Rhode Island, Cranston, Rhode Island.

(ii) The judgments sought to be reviewed are the judgment of the Supreme Court of Rhode Island, made and entered December 28, 1962, and the order of commitment of the Superior Court of Providence County, made and entered January 21, 1963. The Notice of Appeal to the Supreme Court of the United States was filed February 6, 1963 in the Superior Court of the State of Rhode Island, County of Providence, and on February 11, 1963, in the

Superior Court of the State of Rhode Island, County of Washington.

(iii) Jurisdiction of the appeal is conferred on this Court by Title 28 of the United States Code, Section 1257(2).

(iv) Cases sustaining the jurisdiction of this Court are: *American Seeding Machine Co. v. Kentucky*, 236 U. S. 660; *Connelly* v. *General Construction Company*, 269 U. S. 385; *Lanzetta* v. *New Jersey*, 306 U. S. 451; *Winters* v. *New York*, 333 U. S. 507; *Cramp* v. *Board of Public Instruction of Orange County, Florida*, 368 U. S. 278.

(v) The validity of Title 11, Chapter 34, Section 5 of the General Laws of Rhode Island (1956) is involved. The cited statute makes it unlawful for any person to commit or cause or induce another person to commit "prostitution • • • lewdness, fornication, or any unlawful sexual intercourse or *any other indecent act.*" (emphasis added) The text of Sections 5, 6, and 7, Title 11, Chapter 34, is set forth in the Appendix at Pages 24 to 25.

(c) The Questions Presented by the Appeal

(1) Whether Title 11, Chapter 34, Section 5 of the General Laws of Rhode Island (1956) is so vague, indefinite and uncertain that its enforcement violates the due process clause of the Fourteenth Amendment to the Constitution of the United States.

(2) Whether the aforesaid statute as constituted and/or applied violates defendant's right of free association, all in violation of the First and Fourteenth Amendments to the Constitution of the United States.

(3) Whether the defendant had been placed in double jeopardy by being forced to stand trial on charges of violating the aforesaid statute following the previous dismissal of the identical charges after trial, all in violation of the

Fifth and Fourteenth Amendments to the Constitution of the United States.

(4) Whether the aforesaid statute as constituted and/or applied has placed the defendant in double jeopardy, all in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

(d) The Material Facts of the Case

Appellant, presently a resident of the State of New York, resided at the time of the alleged offense in a two-story private house at 96 High Street, Westerly, Rhode Island. On September 15, 1959, Appellant was arrested by the police of the Town of Westerly and charged with violating Title 11, Chapter 45, Section 1 of the General Laws of Rhode Island (1956) as amended, entitled "Vagrants and disorderly persons—Commitment of drunkards and lewd, wanton or lascivious persons." (See Appendix, Pages 25 to 26.) After a trial, the said charges were dismissed on motion by the prosecution on December 18, 1959.

On that same day, Appellant was charged with violating Title 11, Chapter 34, Section 5 of the General Laws of the State of Rhode Island (1956). On March 25, 1960, after trial, the charges, upon the recommendation of the presiding judge, were withdrawn by the prosecution. On April 7, 1960, secret indictments returned by the Grand Jury sitting in Washington County again charged Appellant with violating Title 11, Chapter 34, Section 5, to which charges Appellant subsequently pleaded not guilty. On May 12, 1960, Appellant's motion for a change in venue was granted and his case was referred to the Superior Court of Providence County for further proceedings.

Following the denial of Appellant's motion to quash the indictment on constitutional and other grounds, Appellant was tried before a judge and jury, convicted as charged, and, after the denial of a motion in arrest of judgment, was sentenced to one year in the Adult Correctional Institutions

of the State of Rhode Island. On December 28, 1962, his conviction was unanimously affirmed by the Supreme Court of Rhode Island (See Appendix, Pages 13 to 22). On January 21, 1963, he was ordered committed and is presently confined in the aforesaid Adult Correctional Institutions. (See Appendix, Page 23).

The following Federal questions sought to be reviewed were raised in the aforesaid motions and appeal:

(1) Whether Title 11, Chapter 34, Section 5 of the General Laws of Rhode Island (1956) is so vague, indefinite and uncertain that its enforcement violates the due process clause of the Fourteenth Amendment to the Constitution of the United States.

(2) Whether Title 11, Chapter 34, Section 5 of the General Laws of Rhode Island (1956) is couched in such broad and general language that the ordinary man would not know when he is committing a crime, all in violation of the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of Rhode Island passed on the questions raised. In its unanimous opinion, the Court expressly concluded that the constitutional questions raised by Appellant were without foundation (Appendix, Pages 18 to 21).

Although the double jeopardy question was not argued in the Courts below, it was raised by implication in Appellant's brief submitted to the Supreme Court of Rhode Island in which it was stated on page 3 thereof as follows:

> "On the same day the defendant was immediately arraigned and charged with violating Title 11, Chapter 34, Section 5 of the General Laws of Rhode Island (1956), and after trial, on March 26, 1960, these said charges were withdrawn by the prosecuting attorney, upon recommendation of Justice Trumpetto. On April 7, 1960, the defendant was again charged with violating Title 11, Chapter 34, Section 5 upon indictments by the Grand Jury sitting in Washington County, *these charges being based upon the same facts as the preceding case.*" (emphasis supplied)

Since the immunity may be waived impliedly (*Harris* v. *United States*, 237 F. 2d 274), it may likewise be raised by implication. It was, however, not mentioned in the aforesaid opinion of the Supreme Court of Rhode Island.

(e) The Federal Questions are Substantial

1. Title 11, Chapter 34, Section 5 of the General Laws of Rhode Island (1956) is so vague, indefinite and uncertain that its enforcement violates the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

According to the statute in question, it is unlawful in Rhode Island for a person to be engaged, in one way or another, in the commission of "prostitution, or any other lewd or indecent act * * * lewdness, fornication, unlawful sexual intercourse or any other indecent act." Since the specification of the charge against Appellant was that he committed "an indecent act", it is his contention that only that phrase need be considered by this Court. But he urges that, of all the terms used by the statute, only "fornication", (sexual intercourse by an unmarried person) "prostitution" (sexual intercourse for hire) and "unlawful sexual intercourse" (adultery or fornication) can lay any claim to sufficient definiteness to meet the requirements of constitutional due process. It is Appellant's contention that the precise issues raised by this appeal have never been passed upon by this Court, and that it presents an ideal opportunity for such a pronouncement.

In other areas, this and other courts have had little difficulty in invalidating statutes which relied on such terms of disapprobation as "sacrilegious", "sexual immorality", "perversion", "lewdness", "indecent", and "immoral". See *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495; *Commercial Pictures Corp.* v. *Regents*, 346 U. S. 587; *In the Matter of Kingsley International Pictures Corporation* v. *Regents*, 360 U. S. 684; *Winters* v. *New York*, 333

U. S. 507; *W. L. Gelling* v. *Texas*, 343 U. S. 960; *Superior Films* v. *Department of Education of Ohio*, 346 U. S. 587; *Matter of Excelsior Pictures Corp.* v. *Regents*, 3 N. Y. 2d 237; *Holmby Productions* v. *Vaughn*, 350 U. S. 870; *Hallmark Productions* v. *Carroll*, 384 Pa. 348; *Capitol Enterprises, Inc.* v. *Regents*, 1 A. D. 2d 990 (N. Y.).

In the area of sex and morality, an increasing number of state courts have invalidated criminal statutes on the grounds of vagueness, uncertainty and indefiniteness In this connection, see *State ex rel Murphy* v. *Morley*, 63 N. M. 267; *State* v. *Musser*, 118 Utah 537; *State* v. *Christine*, 239 La. 259.

In the last cited case, the Supreme Court of Louisiana held that a state which proscribed conduct which consisted of the "performance by any person • • • in any public place or in any public manner, of any act of lewdness or indecency, grossly scandalous and tending to debauch the morals and manners of the people" was so indefinite, vague and uncertain as to render it violative of the Fourteenth Amendment. The court stressed the fact that such a generality as "any act of lewdness or indecency" required a sufficient standard to make the conduct it sought to prohibit reasonably clear.

In reaching its decision, the court relied on the following Louisiana cases, all of which found the language of statutes regulating sexual morality too indefinite to meet the requirements of constitutional due process: *City of Shreveport* v. *Wilson*, 145 La. 906 ("other lewd or indecent acts"); *State* v. *Vallery*, 212 La. 1095 ("any immoral act"); *State* v. *Truby*, 211 La. 178 ("any illegal or immoral purpose"); and *State* v. *Kraft*, 214 La. 351 ("indecent"). In the last cited case, the court stated:

> "The word 'indecent', standing alone, has many different meanings according to the standard of the individual using or defining the word. In Webster's New International Dictionary, the word is defined

> as 'unbecoming or unseemly', 'indecorous as indecent haste', 'morally unfit to be seen or heard' 'offensive to modesty and delicacy as indecent language', 'immodest', 'impure', 'gross', 'obscene'."

2. Title 11, Chapter 34, Section 5 of the General Laws of Rhode Island (1956) is couched in such broad and general language that the ordinary man would not know when he is committing a crime, all in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The difficulty of ascertaining the meaning of all but three obviously inapplicable terms of the statute in question has already been alluded to. In *Rittenour* v. *District of Columbia*, 163 A. 2d 558, the defendant appealed his conviction for committing a "lewd, obscene, or indecent act in the District of Columbia". The defendant, in the privacy of his own home, made a homosexual advance toward a policeman who had been sent there to entrap him. In unanimously reversing the defendant's conviction, the three-judge Municipal Court of Appeals stated:

> "Although an open or public act in the common law sense is no longer required, it is our opinion that the present law was not designed or intended to apply to an act permitted in privacy in the presence of a single and consenting person. And we believe it is obvious that the witness by his act led the defendant to believe he would consent, or at least not object to his homosexual advances * * * Basically and essentially, appellant was arrested, tried and convicted on a charge of being a homosexual; but under our law homosexuality is not a crime."

It is not difficult for legislatures to enact statutes that are sufficiently definite to meet the requirements of constitutional due process. Section 213.2 of the Proposed Official Draft of the Model Penal Code of the American Law Institute (May 4, 1962) is a prime example of clear draftsmanship in this area (Appendix, Pages 29 to 30). By clearly

defining "deviate sexual intercourse" and then by stating exactly what conduct is criminal, the section in question is capable of being understood by "the ordinary man". See also § 213.3 as to minors (Appendix, Page 30) and Title 38, Article 11 §§ 11-2 through 11-6 inclusive, and 11-9, Illinois Revised Statutes (1961) (Appendix, Pages 26 to 29).

Any dispassionate reading of the statute in question discloses that it is solely and exclusively confined to prostitution. Its heading—Transporting for Indecent Purposes — Streetwalking — Harboring Prostitution — leaves little room for mistaking its intent and coverage. If there was any doubt as to this interpretation, Sections 6 and 7 dispel it. Moreover, such crimes as fornication, adultery and sodomy are fully covered by other portions of the General Laws of Rhode Island (1956), e.g. Title 11, Chapter 6, Sections 2 and 3 (adultery and fornication); Title 11, Chapter 10, Section 1 (crime against nature). Contributing to the delinquency of a minor is covered by Title 11, Chapter 9, Section 4.

3. The statute as constituted and/or applied violates Appellant's right of free association, all in violation of the First and Fourteenth Amendments to the Constitution of the United States.

In *Rittenour* v. *District of Columbia* (163 A. 2d 558), the court stated that "the common law conception of a lewd, obscene or indecent act apparently comprehended only behavior that was open or public; an act done privately in the presence of only one other person who solicited or consented to the act did not fall within conduct enjoined by the common law." In this connection, see also 33 Am. Jur., Lewdness, Indecency and Obscenity.

The proposed official draft of the Model Penal Code which was approved by the American Law Institute on May 4, 1962, recognized the good sense of the common law by

eliminating as a crime deviate sexual relations engaged in in private by consenting adults (Appendix, Pages 29 to 30). *Ibid.* Article 11, Illinois Revised Statutes (1961) (Appendix, Pages 26 to 29). See also British Parliamentary Report (London, September 1957) on Prostitution and Homosexual Offenses.

It is Appellant's contention that any statutes that make criminal conduct specifically permitted by the Model Penal Code and which attempt to punish sexual deviations which are, in the light of modern psychiatric and sexual knowledge, not considered as criminal, violate the free association concept of the First Amendment to the Constitution of the United States. See *National Association for Advancement of Colored People* v. *State of Alabama,* 357 U. S. 449.

4. The Appellant has been placed in double jeopardy by being forced to stand trial twice for the same offense, all in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

The constitutional guarantee against "double jeopardy" is violated when a defendant is subjected to successive retrials or when a trial is prevented from proceeding to termination in favor of the defendant merely in order to allow the prosecutor to see whether he can do better a second time. *Downum* v. *United States,* 300 F. 2d 137. It is submitted that the Appellant, who was put in jeopardy when he was first tried for the offense of which he was subsequently convicted (*Clawans* v. *Rives,* 104 F. 2d 240) could not constitutionally be tried again without violating his rights under the Fifth and Fourteenth Amendments to the Constitution of the United States. *Green* v. *United States,* 355 U. S. 184.

5. The questions presented are so substantial as to require plenary consideration.

As to Points 1 and 2 above, this Court has already indicated its hostility to the vagueness of such terms as

"indecent", "immoral" and other terms of disapprobation. *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495; *Commercial Pictures Corp.* v. *Regents*, 346 U. S. 587; *In the Matter of Kingsley International Pictures Corp.* v. *Regents*, 360 U. S. 684. Although the cited cases referred to various licensing laws, it would seem that such discredited terms should at least fare no better when they are used in a criminal statute upon the interpretation of which a man's liberty may depend.

It is apparent that both the State courts and lower Federal courts are hopelessly confused as to the application of the due process standards illuminated in the above cited cases to criminal statutes attempting to regulate private and personal sexual behavior. See *Lovelace* v. *Clark*, 83 Ariz. 27; *New American Library of World Literature* v. *Allen*, 114 F. Supp. 823; *In re Tahiti Bar, Inc.*, 395 Pa. 355, appeal dismissed 361 U. S. 85; *Com.* v. *Randall*, 183 Pa. Super. 603, cert. den. 355 U. S. 954; *State ex rel. Murphy* v. *Morley*, 63 N. M. 267; *People* v. *Delbert*, 117 Cal. App. 2d 410; *State* v. *Musser*, 118 Utah 537; *Fowler* v. *State*, 189 Ga. 733; *Kahalley* v. *State*, 254 Ala. 482. It is respectfully submitted that a plenary consideration of the basic questions presented on this appeal and a statement of this Court's position after such consideration, will avoid further confusion and a plethora of prosecutions based on hopelessly unconstitutional and out-moded sex legislation. A mature and modern examination of our so-called "sex laws" is long overdue.

March 1, 1963.

Respectfully submitted,

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APPENDIX

The Opinion Below

Ex. No. 10,203

STATE

v.

ROBERT MILNE [187 A. 2d 136]
136-142

ROBERTS, J. This is an indictment wherein it is charged that the defendant received into his room in a dwelling house in the town of Westerly a person "for the purpose of committing an indecent act * * *." After a trial to a jury in the superior court the defendant was found guilty. Thereafter his motion for a new trial was denied by the trial justice, who then committed the defendant to a term of one year. The defendant has prosecuted a bill of exceptions to this court.

It appears from the record that on April 7, 1960 defendant pleaded not guilty to the indictment and that on May 12, 1960 a justice of the superior court granted his motion for a change of venue as a consequence of which the case was transferred to Providence county for trial. Thereafter in Providence county defendant's motion for the filing of special pleas was heard and denied on May 18, 1960. On June 17, 1960 his motion to quash the indictment was heard and denied. The case went to trial in the superior court on October 18, 1960, and, after having been found guilty, defendant moved for a new trial, which motion was heard and denied on November 4, 1960. On January 4 the justice

of the superior court, after denying the motion of defendant to arrest the judgment, imposed the sentence above referred to.

It is not disputed that the intendment of this indictment is to charge defendant with a violation of G. L. 1956, § 11-34-5, in that he received into a room in a dwelling house a sixteen-year-old boy for the purpose of committing an indecent act. Section 11-34-5 is an omnibus enactment that makes unlawful certain conduct when designed to promote prostitution and lewdness. The statute, in substance, makes it unlawful for any person to secure or transport another "for the purpose of prostitution, or for any other lewd or indecent act" or to loiter on any thoroughfare or in any public or private place to induce, solicit or entice another "to commit lewdness, fornication, unlawful sexual intercourse or any other indecent act * * *." The specific provision thereof pertinent to this indictment makes it unlawful for one person "to receive or offer or agree to receive any person into any place, structure, house, building, room, or conveyance for the purpose of committing any such acts * * *"

It appears from evidence adduced by the prosecution and not contradicted by defendant that on the evening of September 3, 1959 a youth, then sixteen years of age, went to the dwelling house wherein defendant resided. Entering the house he went to a bedroom where he met defendant and thereafter submitted to a sexual connection per os on the part of defendant. It further appears that the submission of the youth was entirely voluntary and that at the time the act was consummated the participants were alone in the bedroom.

The specific offense then with which this defendant is charged is receiving a person in a room for the purpose of committing an indecent act therein, the conduct made unlawful by the pertinent portion of § 11-34-5. The indecent act prerequisite to guilt set out in the indictment as a "sexual connection per os" describes the act of copulation per os,

hereinafter referred to as fellatio. The defendant relies primarily upon his contention that fellatio is not an indecent act within the contemplation of the statute inasmuch as it was not a crime at common law and has not been made one by statute. Absent an indecent act defendant argues he cannot be guilty of the conduct proscribed in the pertinent part of § 11-34-5.

The defendant, as we understand him, does not argue that fellatio, if criminal, would not be an indecent act within the purview of § 11-34-5. This contention is that fellotio is not criminal, at least when performed in the circumstances revealed by the evidence here. Therefore, he argues that in this case the act for which he received another into the room cannot be held to constitute an indecent act within the meaning of § 11-34-5.

We cannot agree with the conclusion that defendant thus reaches, it being our opinion that under the provisions of G. L. 1956, § 11-10-1, fellatio has been made criminal whatever might be the circumstances in which it is committed. The statute, in pertinent part, reads: "Every person who shall be convicted of the abominable and detestable crime against nature, either with mankind or with any beast, shall be imprisoned • • •."

The inquiry that this court may properly make in this case is limited to ascertaining from the terms of the statute whether the legislature intended to make fellatio criminal and, if so, whether provision was made therein for any exception under which the act would not be criminal by reason of the circumstances in which it was performed. Whether the act, when performed in private between consenting adults, should be deemed to be free of criminality and excepted from the statute is a matter exclusively for determination by the legislature. If, in enacting the pertinent statute, the legislature has not so provided, then this court will not under the guise of construing the statute read into it any such exception.

There is a substantial and persuasive line of authorities supporting the proposition that statutes which make the crime against nature unlawful are not merely declaratory of the common law, which would confine the statutory offense to the doing of such acts as would constitute sodomy at the common law. To the contrary, these authorities hold that where the crime against nature is made criminal by statute, the legislation is to be given a broad and comprehensive construction so as to include within the prohibition thereof unnatural copulation in all its forms. In other words, the generality of the prohibition of statutes of this kind is significant of a legislative intent to bring within the thrust of such legislation all unnatural acts of copulation involving either man or beast and including sodomy. *State* v. *Cyr*, 135 Mo. 513. In that case, the statute being identical with ours, the court said at page 514: "By the weight of recent authority apparently supported by better reasoning, sodomy as used in connection with statutes prohibiting the crime against nature is interpreted in its broad sense and held to include all acts of unnatural copulation with mankind or beast." Statutes that are almost identical with the statute here under consideration have been construed as including fellatio. *State* v. *Griffin*, 175 N. C., 767; *Sledge* v. *State*, 142 Neb. 358; *In re Benites*, 37 Nev. 145; *State* v. *Maida*, 29 Del. 40.

The courts which adhere to this view attach significance to the phrasing in these statutes, noting that they do not refer to the common-law offense of sodomy but expressly prohibit the crime against nature. These courts find this phraseology significant of the legislative intention to proscribe unnatural sexual activities beyond those which were contained in the common-law offense of sodomy. In the case of *Berryman* v. *State*, Okl. Cr., 283 F.2d 558, the court, considering a statute almost identical with ours, said at page 563: "We emphasize again that out [sic] statute does not mention the word sodomy, but punishes the 'abominable and detestable crime against nature' which includes

not only sodomy as defined at common law but all unnatural sexual copulation."

In considering similar language the Indiana court found it significant of an intention to proscribe conduct other than that which would constitute sodomy at common law. In construing a statute almost identical with the one here under consideration, that court in *Murray* v. *State*, 236 Ind. 688, at page 693, quotes with approval from *Sanders* v. *State*, 216 Ind. 663. In that case the court said at page 664: "The statute in this state defines the crime as 'the abominable and detestable crime against nature with mankind or beatst.' This court has held in common with the courts of other jurisdictions under similar statutes, that the statutory definition includes both common-law sodomy and acts of a bestial character whereby degraded and perverted sexual desires are sought to be gratified contrary to nature."

We also attach significance to the use of the phrase "crimes against nature" in the instant statute. In employing this phraseology the legislature made clear an intention to change the common law with respect to the criminality of unnatural copulation and, in so doing, made inappropriate an application of the role of statutory construction concerning the strict constructiron of penal statutes. Conceding the validity of the rule of strict construction of penal statutes in appropriate cases, it is not to be invoked where its effect would be to defeat a clear legislative intent, which in the instant statute is to proscribe all forms of unnatural copulation whether or not such would have constituted sodomy at common law. *State* v. *Foster*, 12 R. I. 163.

The legislative intent to proscribe all unnatural copulation in § 11-10-1 becomes abundantly clear when the provisions of title 11 are read in their entirety. The provisions thereof which relate to sexual offenses reveal an intention to proscribe all natural copulation that takes place outside of the marriage status. In view of this intention

the legislature will not be presumed to have intended to reach an absurd result by further proscribing only those unnatural copulations that would have constituted sodomy at common law while leaving uninhibited all other forms of unnatural copulation. Statutes are not to be so construed as to reach meaningless or absurd results. *State* v. *Exford*, 35 R. I. 387. We are of the opinion then that when the provisions of § 11-10-1 are read in the context of the entire title, the legislative intent becomes obvious, that is, that unnatural sexual copulation was to be made unlawful along with normal extramarital sexual intercourse.

It is conceded that the legislature could have made fellatio unlawful in express terms, and it may be argued that had it so intended it would have done just that. Reasoning of this kind has frequently been employed by the courts when construing statutes to buttress refusals to read into them provisions which were not included therein in express terms by the legislature. It is not always, however, an effective or even appropriate test for ascertaining the intent of a legislature from the terms of the statute. In our opinion that is so in the instant case.

It is well settled that in enacting statutes the legislature is presumed to know the law and the effect thereof on its enactments. *State* v. *Lewis*, — R. I. —, 161 A. 2d 209. It would therefore be proper in the instant case to presume that the legislature was cognizant of the rule that statutory enumerations are frequently held to exclude matters not within the enumeration. In such a circumstance the legislature would be aware that the very comprehensiveness it sought to attain in the instant statute by using the phrase "crime against nature" could be nullified by any attempt to enumerate. It is our opinion that fellatio is criminal under the provisions of § 11-10-1 and is therefore an indecent act within the purview of the pertinent provisions of § 11-34-5.

The defendant contends also that § 11-34-5 is so vague and indefinite concerning the conduct therein prescribed as

to violate his constitutional right to due process under art. I, sec. 10. of the constitution of Rhode Island and the fourteenth amendment to the federal constitution. In substance he argues that the statute is unconstitutional in that it fails to sufficiently describe the offense contemplated therein and to set out reasonably adequate standards for the determination of guilt thereunder. In essence then he is rasing the question whether the provisions of the statute satisfy the constitutional requirement for certainty in penal statutes. Arguing that it does not, defendant contends that the phrase "an indecent act" is not a sufficient definition of the offense so as to inform the public of the specific conduct which constitutes such an act or to provide the courts with any adequate standards for ascertaining what particular conduct does in fact violate the statute.

The constitutional requirement for certainty in penal statutes has been repeatedly considered by appellate courts, its thrust analyzed, and its burden defined. The extent of the legislative burden that inheres therein has been stated in *Boyee Motor Lines, Inc.* v. *United States,* 342 U. S. 337, at page 340, as follows: "A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation. But few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of prescribed conduct shall take the risk that he may cross the line."

We are unable to agree that the instant statute lacks the certainty required by the constitution. Primarily the requirement is reasonable certainty, and it is our opinion

that when the language employed to particularize the conduct prohibited is as specific as the subject matter reasonably permits, the constitutional requirement is satisfied. Obviously, some crime is almost impossible of description, particularly on the basis of a statement of all possible modes and manners in which the crime may be committed. It would not be reasonable to require a legislature to anticipate and describe in other than comprehensive terms all of the bizarre means for perverting the sexual function that are conceived by depraved minds. "In judging the sufficiency of the language employed in a penal statute it is necessary to given consideration to the latitude of the field encompassed and the consequent impracticability of rigid legislative criteria." *State* v. *Monteleone*, 36 N. J. 93, 99. It is obviously impracticable to attempt to prescribe rigid legislative criteria proscribing conduct in the area of sexual perversion and deviation. We are of the opinion that the language here challenged conveys a sufficiently definite warning as to the conduct proscribed when it is viewed in the light of common understanding and practice. The constitution requires no more certainty than this. *United States* v. *Petrillo*, 332 U. S. 1; *Blake* v. *State*, 210 Md. 459.

The sufficiency of the language in § 11-34-5 becomes clear, in our opinion, when it is read in the context in which it appears therein. In that context the legislature clearly intended using the term "indecent act" to include within the scope of the statute all unlawful sexual conduct as well as certain extramarital conduct therein already specified. In other words, it was making clear its intention to proscribe all unlawful sexual conduct, natural or unnatural, so as to avoid the exclusory effect that might be given to its enumeration of prostitution, lewdness, fornication, and unlawful sexual intercourse. The pertinent statute contemplates making unlawful any conduct designed to promote and further the accomplishment of sexual offenses, whether

natural or unnatural, and, in our opinion, is sufficiently definite to convey a sufficient warning of the conduct proscribed therein when measured by common understanding. *State* v. *Hudson County News Co.*, 35 N. J. 284. It is then our opinion that the pertinent provision of § 11-34-5 meets the constitutional requirement of certainty in penal statutes.

We turn now to a consideration of defendant's exceptions to the denial by the trial justice of his motion to file special pleas out of time, including a demurrer, and his motion to quash the indictment. Because these motions were made subsequent to defendant's plea of not guilty, we are not persuaded that the denial thereof by the trial justice was arbitrary and constituted an abuse of discretion. See *State* v. *Douglas*, 78 R. I. 60. If, however, we assume that error did inhere in either or both of these rulings, we are unable to perceive that defendant was thereby prejudiced. Each motion was based on defendant's contention that the provisions of the statute were so vague and indefinite as to deprive him of due process under the state and federal constitutions.

An examination of the record, however, reveals that defendant, in arguing his motion for a directed verdict, put this constitutional issue squarely before the trial court. Upon a denial of the motion he prosecuted an exception to this court and thereunder argued the constitutional question here. In that circumstance it is our opinion that if error did inhere in either of these rulings, it was not prejudicial to defendant, and his exception therefore is overruled. For the same reason it is our opinion that the denial of his motion for an arrest of judgment subsequent to the verdict, if erroneous, was not prejudicial and his exception thereto is also overruled.

There remain for our consideration two exceptions taken by defendant to evidentiary rulings of the court. One of these was taken to a ruling by the trial justice sustaining the state's objection to inquiry by defendant as

to whether the witness, who had participated in the offense charged, had been charged by the state with the commission of a criminal offense. The interrogation was conceded to go to the credibility of the witness. In our opinion there was no error in the ruling sustaining the objection. The credibility of a witness may not be impeached by a showing of an arrest or a criminal accusation but only upon a showing of a conviction or a sentence. G. L. 1956, § 9-17-15. See *State* v. *Christofaro*, 70 R. I. 57.

The remaining exception was taken to a ruling of the trial justice sustaining the state's objection to an inquiry addressed to the same witness asking whether, in participating in fellatio, he felt that he was "doing something wrong." The defendant contends the question was properly put for the purpose of adducing evidence as to the moral standards of the community. The trial justice sustained the objection expressly on the ground that on the issue of the moral standards in the community the "particular feeling and emotions of this witness" would be irrelevant. We see no error in this ruling, and both of these exceptions of the defendant are overruled.

All of the defendant's exceptions are overruled, and the case is remitted to the superior court for further proceedings.

Order of Commitment

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

Washington, Sc. Superior Court

Indictment No. 1548

STATE OF RHODE ISLAND

v.

ROBERT MILNE

January 21, 1963

Heard Before His Honor:

MR. EUGENE L. JALBERT

• • •

The Court: Well, the only official character of this case at this moment is that of one where sentence has been imposed, where all points taken up to our Supreme Court for consideration have been adjudicated. There is nothing else. That is officially before me, and therefore, I think there is only one thing to do and that is order the defendant committed to begin service of his sentence which was imposed.

• • •

The Court: I have the right to order the man committed or else I haven't. If I haven't, you can take an exception to that. The man is ordered committed.

• • •

THE STATUTES INVOLVED

Title 11, Chapter 34

General Laws of Rhode Island (1956)

Prostitution and Lewdness

Section 5. Transportation for Indecent Purposes—Streetwalking—Harboring Prostitution—It shall be unlawful for any person to secure, direct or transport, or offer to secure, direct or transport another for the purpose of prostitution, or for any other lewd or indecent act; or to loiter in or near any thoroughfare or public or private place for the purpose of inducing, enticing, soliciting, or procuring another to commit lewdness, fornication, unlawful sexual intercourse or any other indecent act; or to commit or in any manner induce, entice, or solicit, or procure a person in any thoroughfare, or public or private place or conveyance to commit any such act; or to receive or offer or agree to receive any person into any place, structure, house, building, room, or conveyance for the purpose of committing any such acts, or knowingly permit any person to remain therein for any such purposes, or to, in any way, aid or abet or participate in any of the acts or things enumerated herein.

Any person found guilty under this section, shall be subject to imprisonment in the adult correctional institutions not to exceed five (5) years.

Section 6. Reputation Testimony as Evidence—In the trial of any person charged with a violation of § 11-34-5, testimony concerning the reputation of the place wherein the violation occurred or of persons who frequent or reside therein shall be admissible in evidence in support of the charge.

SECTION 7. EXAMINATION AND TREATMENT FOR VENEREAL DISEASE—Any person convicted for any violation of § 11-34-5 or of any other statute relating to lewd or lascivious behavior or unlawful sexual intercourse, and who shall be confined or imprisoned in any correctional institution for more than ten (10) days, may be examined by the department of health, for venereal disease, through duly appointed, licensed physicians as agents; and any such person so examined may be detained until the result of such examination is duly reported; and if found with venereal disease in an infectious stage, such person shall be treated therefor, and, if a menace to the public, quarantined, in accordance with rules and regulations, not inconsistent with law, of the director of health, who is hereby authorized to formulate and issue the same. Refusal to comply with or obey such rules or regulations shall constitute a misdemeanor and be punishable by fine, not to exceed two hundred fifty dollars ($250), or by imprisonment not to exceed three months (3) or by both such fine and imprisonment.

Title 11, Chapter 45, Section 1

General Laws of Rhode Island (1956)

11-45-1 VAGRANTS AND DISORDERLY PERSONS—COMMITMENT OF DRUNKARDS AND LEWD, WANTON AND LASCIVIOUS PERSONS—

Every idle person who, being of doubtful reputation and having no visible means of support, shall live without employment; every sturdy beggar who shall apply for alms or solicit charity; every tramp; every person wandering abroad and lodging in station houses, outhouses, market places, sheds, stables, or uninhabited buildings, or in the open air, and not giving a good account of himself; and every peeping-

tom, so-called; every person who shall go about from place to place to beg or receive alms, every common prostitute, drunkard and night walker; every lewd, wanton or lascivious person, in speech or behaviour, common reveler or brawler; every person who shall speak or behave in an obscene or indecent manner in any public place, or within the view of others; every person who shall neglect all lawful business and habitually misspend his time by frequenting houses of ill fame, gaming houses or tippling shops; every common cheat, vagrant, or disorderly person, shall be imprisoned not more than three (3) years in the adult correctional institutions * * *.

Illinois Revised Statutes (1961)

Chapter 38, Article 11

SEX OFFENSES

§ 11-2 Deviate Sexual Conduct

"Deviate Sexual Conduct" for the purpose of this Article, means any act of sexual gratification involving the sex organs of one person and the mouth or anus of another.

§ 11-3 Deviate Sexual Assault

(A) Any person of the age of 14 years or upwards, who, by force or threat of force, compels any other person to perform or submit to any act of deviate sexual conduct commits Deviate Sexual Assault.

(B) Penalty.

A person convicted of deviate sexual assault shall be imprisoned in the penitentiary from one to fourteen years.

§ 11-4 Indecent Liberties with a Child

(A) Any person of the age of 17 years and upwards who performs or submits to any of the following acts with a child under the age of 16 commits indecent liberties with a child:

(1) Any act of sexual intercourse; or

(2) Any act of deviate sexual conduct; or

(3) Any lewd fondling or touching of either the child or the person done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the person or both.

(B) It shall be an affirmative defense to indecent liberties with a child that:

(1) The accused reasonably believed the child was of the age of 16 or upwards at the time of the act giving rise to the charge; or

(2) The child is a prostitute; or

(3) The child has previously been married.

(C) Penalty.

A person convicted of indecent liberties with a child shall be imprisoned in the penitentiary from one to twenty years.

§ 11-5 Contributing to the Sexual Delinquency of a Child

(A) Any person of the age of 14 years and upwards who performs or submits to any of the following acts with any person under the age of 18 contributes to the sexual delinquency of a child:

(1) Any act of sexual intercourse; or

(2) Any act of deviate sexual conduct; or

(3) Any lewd foundling or touching of either the child or the person done or submitted to with the intent to arouse

or to satisfy the sexual desires of either the child or the person or both; or

(4) Any lewd act done in the presence of the child with the intent to arouse or to satisfy the sexual desires of either the person or the child or both.

(B) It shall not be a defense to contributing to the sexual delinquency of a child that the accused reasonably believed the child to be of the age of 18 or upwards.

(C) Penalty.

A person convicted of contributing to the sexual delinquency of a child shall be fined not to exceed $1,000.00 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both.

§ 11-6 Indecent Solicitation of a Child

(A) Any person of the age of 17 years and upwards who solicits a child under the age of 13 to do any act, which if done would be an indecent liberty with a child or an act of contributing to the sexual delinquency of a child commits indecent solicitation of a child

(B) It shall not be a defense to indecent solicitation of a child that the accused reasonably believed the child to be of the age of 13 years and upwards.

(C) Penalty.

A person convicted of indecent solicitation of a child shall be filed not to exceed $500.00 or imprisoned in a penal institution other than the penitentiary not to exceed six months, or both.

§ 11-9 Public Indecency

(A) Any person of the age of 17 years and upwards who performs any of the following acts in a public place commits a public indecency:

(1) An act of sexual intercourse; or

(2) An act of deviate sexual conduct; or

(3) A lewd exposure of the body done with intent to arouse or to satisfy the sexual desires of a person; or

(4) A lewd fondling or caress of the body of another person of the same sex.

(B) "Public place" for purposes of this section means any place where the conduct may reasonably be expected to be viewed by others.

(C) Penalty.

A person convicted of public indecency shall be fined not more than $500.00 or imprisoned in a penal institution other than the penitentiary not to exceed six months, or both.

PROPOSED OFFICIAL DRAFT, MODEL PENAL CODE, AMERICAN LAW INSTITUTE, APPROVED MAY 4, 1962

Section 213.2. Deviate sexual intercourse by force or imposition.

(1) *By force or its equivalent.* A person who engages in deviate sexual intercourse with another person, or who causes another to engage in deviate sexual intercourse, commits a felony in the second degree if:

(a) He compels the other person to participate by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or

(b) He has substantially impaired the other person's power to appraise or control his conduct by administering or employing without the knowledge of the other person drugs, intoxicants or other means for the purpose of preventing resistance; or

(c) The other person is unconscious; or

(d) The other person is less than 10 years old.

Deviate sexual intercourse means sexual intercourse per os or per anum between human beings who are not husband and wife, and any form of sexual intercourse with an animal.

(2) *By other imposition.* A person who engages in deviate sexual intercourse with another person, or who causes another to engage in deviate sexual intercourse, commits a felony of the third degree if:

(A) He compels the other person to participate by any threat that would prevent resistance by a person of ordinary resolution; or

(B) He knows that the other person suffers from a mental disease or defect which renders him incapable of appraising the nature of his conduct; or

(C) He knows that the other person submits because he is unaware that a sexual act is being committed upon him.

Section 213.3 Corruption of Minors and Seduction.

(1) *Offense Defined.* A male who has sexual intercourse with a female not his wife, or any person who engages in deviate sexual intercourse or causes another to engage in deviate sexual intercourse, is guilty of an offense if:

(A) The other person is less than (16) years old and the actor is at least (4) years older than the other person; or

(B) The other person is less than 21 years old and the actor is his guardian or otherwise responsible for general supervision of his welfare; or

(C) The other person is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over him; or

(D) The other person is a female who is induced to participate by a promise of marriage which the actor does not mean to perform.

(2) *Grading.* An offense under paragraph (A) of Sub-Section (1) is a felony of the third degree. Otherwise an offense under this section is a misdemeanor.